

110th Congress }
1st Session }

HOUSE OF REPRESENTATIVES
Rules Committee

{Report
{
{No. _____

Providing for consideration of the bill (H.R. 985) to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes.

March 13, 2007. --Referred to the House Calendar and ordered to be printed

Mr. Hastings of Florida, from the Committee on Rules

submitted the following

REPORT

[To accompany H. Res. _____]

The Committee on Rules, having had under consideration House Resolution _____, by a record vote of 9 to 4, report the same to the House with the recommendation that the resolution be adopted.

SUMMARY OF PROVISIONS OF THE RESOLUTION

The resolution provides for consideration of H.R. 985, to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes. The resolution provides for one hour and 20 minutes of general debate, with one hour equally divided and controlled by the chairman and ranking minority member of the Committee on Oversight and Government Reform and 20 minutes equally divided and controlled by the chairman and ranking member of the Committee on Homeland Security

The resolution waives all points of order against consideration of the bill except those arising under clause 9 or 10 of rule XXI. The resolution makes in order an amendment in the nature of a substitute consisting of the text of the bill, modified by the amendments recommended by the Committee on Oversight and Government Reform now printed in the bill, as the original bill for the purpose of further amendment.

The resolution makes in order those amendments printed in this report. The resolution provides one motion to recommit with or without instructions. Finally, the resolution provides that during consideration in the House of H.R. 985 pursuant to the resolution, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

EXPLANATION OF WAIVERS

The waiver of all points of order against consideration of the bill includes a waiver of clause 4(a) of rule XIII (requiring a three-day layover of the committee report). The waiver is necessary because the Committee on Oversight and Government Reform filed a supplemental report (H. Rept. 110-42, Part 2) with the House on Monday, March 12, 2007 and the bill may be considered by the House as early as Wednesday, March 14, 2007.

COMMITTEE VOTES

The results of each record vote on an amendment or motion to report, together with the names of those voting for and against, are printed below:

Rules Committee Record Vote No. 63

Date: March 13, 2007

Measure: H.R. 985

Motion By: Mr. Dreier

Summary of Motion: To report an open rule.

Results: Defeated 4-9

Vote by Member:

MCGOVERN	NAY
HASTINGS (FL)	NAY
MATSUI	NAY
CARDOZA	NAY
WELCH	NAY
CASTOR	NAY
ARCURI	NAY
SUTTON	NAY
DREIER	YEA
DIAZ-BALART	YEA
HASTINGS (WA)	YEA
SESSIONS	YEA
SLAUGHTER	NAY

Rules Committee Record Vote No. 64

Date: March 13, 2007

Measure: H.R. 985

Motion By: Mr. Diaz-Balart

Summary of Motion: To make in order and provide appropriate waivers for an amendment by Davis, Tom (VA), #4, that would attempt to retain uniformity in the consideration of whistleblower cases in the federal courts by keeping in place the current requirement that all whistleblower appeals go through the United States Court of Appeals for the Federal Circuit rather than opening up appeals to other circuits.

Results: Defeated 4-9

Vote by Member:

MCGOVERN	NAY
HASTINGS (FL)	NAY
MATSUI	NAY
CARDOZA	NAY
WELCH	NAY
CASTOR	NAY
ARCURI	NAY
SUTTON	NAY
DREIER	YEA
DIAZ-BALART	YEA
HASTINGS (WA)	YEA
SESSIONS	YEA
SLAUGHTER	NAY

Rules Committee Record Vote No. 65

Date: March 13, 2007

Measure: H.R. 985

Motion By: Mr. Hastings of Washington

Summary of Motion: To make in order and provide appropriate waivers for an amendment by Hoekstra (MI), #3, that would strike section 10 of the bill, which extends whistleblower rights to national security employees.

Results: Defeated 4-9

Vote by Member:

MCGOVERN	NAY
HASTINGS (FL)	NAY
MATSUI	NAY
CARDOZA	NAY
WELCH	NAY
CASTOR	NAY
ARCURI	NAY
SUTTON	NAY
DREIER	YEA
DIAZ-BALART	YEA
HASTINGS (WA)	YEA
SESSIONS	YEA
SLAUGHTER	NAY

Rules Committee Record Vote No. 66

Date: March 13, 2007

Measure: H.R. 985

Motion By: Mr. McGovern

Summary of Motion: To report the rule

Results: Adopted 9-4

Vote by Member:

MCGOVERN	YEA
HASTINGS (FL)	YEA
MATSUI	YEA
CARDOZA	YEA
WELCH	YEA
CASTOR	YEA
ARCURI	YEA
SUTTON	YEA
DREIER	NAY
DIAZ-BALART	NAY
HASTINGS (WA)	NAY
SESSIONS	NAY
SLAUGHTER	YEA

SUMMARY OF AMENDMENTS MADE IN ORDER
(summaries derived from information provided by sponsors)

- | | | |
|-------------------------|--|--------------|
| 1. Stupak (MI): | Section 13 of the bill clarifies that instances of political interference with science are to be considered “abuses of authority” and their disclosure therefore protected. The Stupak amendment adds an example of such interference, namely preventing a federal scientist or grantee from publishing or presenting their research. | (10 minutes) |
| 2. Platts (PA): | This amendment would require that the Merit Systems Protection Board rely on a consistent standard for “clear and convincing evidence” as the burden of proof that must be met to sustain an agency’s affirmative defense (that it would have taken the same personnel action independent of an employee’s protected conduct). Under the amendment, “clear and convincing evidence” would be defined as “evidence indicating that the matter to be proved is highly probable or reasonably certain.” | (10 minutes) |
| 3. Platts (PA): | This amendment would clarify that an otherwise-protected disclosure cannot be disqualified because of the forum in which it is communicated. In addition, the amendment would extend equal burdens of proof and individual rights of action to those serving as witnesses in Inspector General or Special Counsel investigations, as well as to those who allege retaliation for refusing to violate the law. | (10 minutes) |
| 4. Sali (ID): | This amendment would remove the provision that would make influencing federally funded scientific research a prohibited personnel practice. | (10 minutes) |
| 5. Tierney (MA): | The amendment changes the section on national security whistleblowers to limit which members of Congress can receive information about especially sensitive subjects, such as sources and methods (to members of the intelligence committees or other relevant committees) and special access programs (to defense committees), and for other programs (to committees with oversight over the program in question). | (10 minutes) |

TEXT OF AMENDMENTS MADE IN ORDER UNDER THE RULE

1. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE
Stupak OF Michigan, OR HIS
DESIGNEE, DEBATEABLE FOR 10 MINUTES:

*Stupak H.R.
Revised*

**AMENDMENT TO H.R. 985, AS REPORTED
OFFERED BY MR. STUPAK OF MICHIGAN**

Page 28, line 19, strike "and".

Page 28, line 21, strike "technical.'" and insert
"technical; and".

Page 28, after line 21, add the following:

- 1 “(3) any action that restricts or prevents an
- 2 employee or any person performing federally funded
- 3 research or analysis from publishing in peer-reviewed
- 4 journals or other scientific publications or making
- 5 oral presentations at professional society meetings or
- 6 other meetings of their peers.”.

2. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE
Platts OF Pennsylvania, OR HIS
DESIGNEE, DEBATEABLE FOR 10 MINUTES:

**AMENDMENT TO H.R. 985, AS REPORTED
OFFERED BY MR. PLATTS OF PENNSYLVANIA**

Strike the heading for section 3 and insert the following (and amend the table of contents accordingly):

1 SEC. 3. DEFINITIONAL AMENDMENTS.

In section 3, insert “(a) DISCLOSURE.—” before “Section” and add at the end the following:

2 (b) CLEAR AND CONVINCING EVIDENCE.—Sections
3 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States
4 Code, are amended by adding at the end the following:
5 “For purposes of the preceding sentence, ‘clear and con-
6 vincing evidence’ means evidence indicating that the mat-
7 ter to be proved is highly probable or reasonably certain.”.

3. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE
Platts OF Pennsylvania, OR HIS
DESIGNEE, DEBATEABLE FOR 10 MINUTES:

**AMENDMENT TO H.R. 985, AS REPORTED
OFFERED BY MR. PLATTS OF PENNSYLVANIA**

In section 2, in the matter to be inserted by paragraphs (1)(A) and (2)(A) thereof, insert “forum,” after “context,”.

In section 2, insert “(a) IN GENERAL.—” before “Section” and add at the end the following:

1 (b) PROHIBITED PERSONNEL PRACTICES UNDER
2 SECTION 2302(b)(9).—Title 5, United States Code, is
3 amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i)
4 of section 1214 and in subsections (a) and (e)(1) of sec-
5 tion 1221 by inserting “or 2302(b)(9)(B)-(D)” after “sec-
6 tion 2302(b)(8)” each place it appears.

In section 1221(k)(1) of title 5, United States Code (as added by section 9(a)), insert “or 2302(b)(9)(B)-(D)” after “section 2302(b)(8)”.

In section 7703(b)(3) of title 5, United States Code (as added by section 9(b)(2)), insert “or 2302(b)(9)(B)-(D)” after “section 2302(b)(8)”.

In the matter to be inserted by section 9(d)(2) in section 7703(c) of title 5, United States Code, insert “or 2302(b)(9)(B)-(D)” after “section 2302(b)(8)”.

In section 2303a(a)(2)(A) of title 5, United States Code (as amended by section 10(a)), insert “forum,” after “context,”.

4. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE
Sali OF Idaho, OR HIS
DESIGNEE, DEBATEABLE FOR 10 MINUTES:

AMENDMENT TO H.R. 985, AS REPORTED

OFFERED BY MR. SALI OF IDAHO

Strike section 13 (and make all necessary technical
and conforming changes).

5. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE
Tierney OF Massachusetts, OR HIS
DESIGNEE, DEBATEABLE FOR 10 MINUTES:

10

**AMENDMENT TO H.R. 985, AS REPORTED
OFFERED BY MR. TIERNEY OF MASSACHUSETTS**

Page 13, strike line 19, and all that follows through
page 24, line 7, and insert the following:

1 SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.

2 (a) IN GENERAL.—Chapter 23 of title 5, United
3 States Code, is amended by inserting after section 2303
4 the following:

5 “§ 2303a. National security whistleblower rights

6 “(a) PROHIBITION OF REPRISALS.—

7 “(1) IN GENERAL.—In addition to any rights
8 provided in section 2303 of this title, title VII of
9 Public Law 105–272, or any other provision of law,
10 an employee or former employee in a covered agency
11 may not be discharged, demoted, or otherwise dis-
12 criminated against (including by denying, sus-
13 pending, or revoking a security clearance, or by oth-
14 erwise restricting access to classified or sensitive in-
15 formation) as a reprisal for making a disclosure de-
16 scribed in paragraph (2).

17 “(2) DISCLOSURES DESCRIBED.—A disclosure
18 described in this paragraph is any disclosure of cov-
19 ered information which is made—

1 “(A) by an employee or former employee in
2 a covered agency (without restriction as to time,
3 place, form, motive, context, or prior disclosure
4 made to any person by an employee or former
5 employee, including a disclosure made in the
6 course of an employee’s duties); and

7 “(B) to an authorized Member of Con-
8 gress, an authorized official of an Executive
9 agency, or the Inspector General of the covered
10 agency in which such employee or former em-
11 ployee is or was employed.

12 “(b) INVESTIGATION OF COMPLAINTS.—An employee
13 or former employee in a covered agency who believes that
14 such employee or former employee has been subjected to
15 a reprisal prohibited by subsection (a) may submit a com-
16 plaint to the Inspector General and the head of the cov-
17 ered agency. The Inspector General shall investigate the
18 complaint and, unless the Inspector General determines
19 that the complaint is frivolous, submit a report of the find-
20 ings of the investigation within 120 days to the employee
21 or former employee (as the case may be) and to the head
22 of the covered agency.

23 “(c) REMEDY.—

24 “(1) Within 180 days of the filing of the com-
25 plaint, the head of the covered agency shall, taking

1 into consideration the report of the Inspector Gen-
2 eral under subsection (b) (if any), determine whether
3 the employee or former employee has been subjected
4 to a reprisal prohibited by subsection (a), and shall
5 either issue an order denying relief or shall imple-
6 ment corrective action to return the employee or
7 former employee, as nearly as possible, to the posi-
8 tion he would have held had the reprisal not oc-
9 curred, including voiding any directive or order de-
10 nying, suspending, or revoking a security clearance
11 or otherwise restricting access to classified or sen-
12 sitive information that constituted a reprisal, as well
13 as providing back pay and related benefits, medical
14 costs incurred, travel expenses, any other reasonable
15 and foreseeable consequential damages, and compen-
16 satory damages (including attorney's fees, interest,
17 reasonable expert witness fees, and costs). If the
18 head of the covered agency issues an order denying
19 relief, he shall issue a report to the employee or
20 former employee detailing the reasons for the denial.

21 “(2)(A) If the head of the covered agency, in
22 the process of implementing corrective action under
23 paragraph (1), voids a directive or order denying,
24 suspending, or revoking a security clearance or oth-
25 erwise restricting access to classified or sensitive in-

1 formation that constituted a reprisal, the head of the
2 covered agency may re-initiate procedures to issue a
3 directive or order denying, suspending, or revoking
4 a security clearance or otherwise restricting access
5 to classified or sensitive information only if those re-
6 initiated procedures are based exclusively on national
7 security concerns and are unrelated to the actions
8 constituting the original reprisal.

9 “(B) In any case in which the head of a covered
10 agency re-initiates procedures under subparagraph
11 (A), the head of the covered agency shall issue an
12 unclassified report to its Inspector General and to
13 authorized Members of Congress (with a classified
14 annex, if necessary), detailing the circumstances of
15 the agency’s re-initiated procedures and describing
16 the manner in which those procedures are based ex-
17 clusively on national security concerns and are unre-
18 lated to the actions constituting the original reprisal.
19 The head of the covered agency shall also provide
20 periodic updates to the Inspector General and au-
21 thorized Members of Congress detailing any signifi-
22 cant actions taken as a result of those procedures,
23 and shall respond promptly to inquiries from author-
24 ized Members of Congress regarding the status of
25 those procedures.

1 “(3) If the head of the covered agency has not
2 made a determination under paragraph (1) within
3 180 days of the filing of the complaint (or he has
4 issued an order denying relief, in whole or in part,
5 whether within that 180-day period or thereafter,
6 then, within 90 days after such order is issued), the
7 employee or former employee may bring an action at
8 law or equity for de novo review to seek any correc-
9 tive action described in paragraph (1) in the appro-
10 priate United States district court (as defined by
11 section 1221(k)(2)), which shall have jurisdiction
12 over such action without regard to the amount in
13 controversy. An appeal from a final decision of a dis-
14 trict court in an action under this paragraph may,
15 at the election of the appellant, be taken to the
16 Court of Appeals for the Federal Circuit (which
17 shall have jurisdiction of such appeal), in lieu of the
18 United States court of appeals for the circuit em-
19 bracing the district in which the action was brought.

20 “(4) An employee or former employee adversely
21 affected or aggrieved by an order issued under para-
22 graph (1), or who seeks review of any corrective ac-
23 tion determined under paragraph (1), may obtain ju-
24 dicial review of such order or determination in the
25 United States Court of Appeals for the Federal Cir-

1 cuit or any United States court of appeals having ju-
2 risdiction over appeals from any United States dis-
3 trict court which, under section 1221(k)(2), would
4 be an appropriate United States district court. No
5 petition seeking such review may be filed more than
6 60 days after issuance of the order or the deter-
7 mination to implement corrective action by the head
8 of the agency. Review shall conform to chapter 7.

9 “(5)(A) If, in any action for damages or relief
10 under paragraph (3) or (4), an Executive agency
11 moves to withhold information from discovery based
12 on a claim that disclosure would be inimical to na-
13 tional security by asserting the privilege commonly
14 referred to as the ‘state secrets privilege’, and if the
15 assertion of such privilege prevents the employee or
16 former employee from establishing an element in
17 support of the employee’s or former employee’s
18 claim, the court shall resolve the disputed issue of
19 fact or law in favor of the employee or former em-
20 ployee, provided that an Inspector General investiga-
21 tion under subsection (b) has resulted in substantial
22 confirmation of that element, or those elements, of
23 the employee’s or former employee’s claim.

24 “(B) In any case in which an Executive agency
25 asserts the privilege commonly referred to as the

1 'state secrets privilege', whether or not an Inspector
2 General has conducted an investigation under sub-
3 section (b), the head of that agency shall, at the
4 same time it asserts the privilege, issue a report to
5 authorized Members of Congress, accompanied by a
6 classified annex if necessary, describing the reasons
7 for the assertion, explaining why the court hearing
8 the matter does not have the ability to maintain the
9 protection of classified information related to the as-
10 sertion, detailing the steps the agency has taken to
11 arrive at a mutually agreeable settlement with the
12 employee or former employee, setting forth the date
13 on which the classified information at issue will be
14 declassified, and providing all relevant information
15 about the underlying substantive matter.

16 "(d) APPLICABILITY TO NON-COVERED AGENCIES.—
17 An employee or former employee in an Executive agency
18 (or element or unit thereof) that is not a covered agency
19 shall, for purposes of any disclosure of covered information
20 (as described in subsection (a)(2)) which consists in whole
21 or in part of classified or sensitive information, be entitled
22 to the same protections, rights, and remedies under this
23 section as if that Executive agency (or element or unit
24 thereof) were a covered agency.

1 “(e) CONSTRUCTION.—Nothing in this section may
2 be construed—

3 “(1) to authorize the discharge of, demotion of,
4 or discrimination against an employee or former em-
5 ployee for a disclosure other than a disclosure pro-
6 tected by subsection (a) or (d) of this section or to
7 modify or derogate from a right or remedy otherwise
8 available to an employee or former employee; or

9 “(2) to preempt, modify, limit, or derogate any
10 rights or remedies available to an employee or
11 former employee under any other provision of law,
12 rule, or regulation (including the Lloyd-La Follette
13 Act).

14 No court or administrative agency may require the ex-
15 haustion of any right or remedy under this section as a
16 condition for pursuing any other right or remedy otherwise
17 available to an employee or former employee under any
18 other provision of law, rule, or regulation (as referred to
19 in paragraph (2)).

20 “(f) DEFINITIONS.—For purposes of this section—

21 “(1) the term ‘covered information’, as used
22 with respect to an employee or former employee,
23 means any information (including classified or sen-
24 sitive information) which the employee or former
25 employee reasonably believes evidences—

1 “(A) any violation of any law, rule, or reg-
2 ulation; or

3 “(B) gross mismanagement, a gross waste
4 of funds, an abuse of authority, or a substantial
5 and specific danger to public health or safety;

6 “(2) the term ‘covered agency’ means—

7 “(A) the Federal Bureau of Investigation,
8 the Office of the Director of National Intel-
9 ligence, the Central Intelligence Agency, the
10 Defense Intelligence Agency, the National
11 Geospatial-Intelligence Agency, the National Se-
12 curity Agency, and the National Reconnaissance
13 Office; and

14 “(B) any other Executive agency, or ele-
15 ment or unit thereof, determined by the Presi-
16 dent under section 2302(a)(2)(C)(ii)(II) to have
17 as its principal function the conduct of foreign
18 intelligence or counterintelligence activities;

19 “(3) the term ‘authorized Member of Congress’
20 means—

21 “(A) with respect to covered information
22 about sources and methods of the Central Intel-
23 ligence Agency, the Director of National Intel-
24 ligence, and the National Intelligence Program
25 (as defined in section 3(6) of the National Se-

1 curity Act of 1947), a member of the House
2 Permanent Select Committee on Intelligence,
3 the Senate Select Committee on Intelligence, or
4 any other committees of the House of Rep-
5 resentatives or Senate to which this type of in-
6 formation is customarily provided;

7 “(B) with respect to special access pro-
8 grams specified in section 119 of title 10, an
9 appropriate member of the Congressional de-
10 fense committees (as defined in such section);
11 and

12 “(C) with respect to other covered informa-
13 tion, a member of the House Permanent Select
14 Committee on Intelligence, the Senate Select
15 Committee on Intelligence, the House Com-
16 mittee on Oversight and Government Reform,
17 the Senate Committee on Homeland Security
18 and Governmental Affairs, or any other com-
19 mittees of the House of Representatives or the
20 Senate that have oversight over the program
21 which the covered information concerns; and

22 “(4) the term ‘authorized official of an Execu-
23 tive agency’ shall have such meaning as the Office
24 of Personnel Management shall by regulation pre-
25 scribe, except that such term shall, with respect to

1 any employee or former employee in an agency, in-
2 clude the head, the general counsel, and the ombuds-
3 man of such agency.”.

110th Congress

1st Session

H. RES. _____

Providing for consideration of the bill (H.R. 985) to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

March 13, 2007

M-----, from the Committee on Rules, reported the following resolution which was referred to the House Calendar and ordered to be printed.

RESOLUTION

Providing for consideration of the bill (H.R. 985) to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes.

Resolved, That at any time after the adoption of this resolution the Speaker may, pursuant to clause 2(b) of rule XVIII, declare the House resolved into the Committee of the Whole House on the state of the Union for consideration of the bill (H.R. 985) to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes. The first reading of the bill shall be dispensed with. All points of order against consideration of the bill are waived except those arising under clause 9 or 10 of rule XXI. General debate shall be confined to the bill and shall not exceed one hour and 20 minutes, with one hour equally divided and controlled by the chairman and ranking minority member of the Committee on Oversight and Government Reform and 20 minutes equally divided and controlled by the chairman and ranking member of the Committee on Homeland Security. After general debate the bill shall be considered for amendment under the five-minute rule. An amendment in the nature of a substitute consisting of the text of the bill, modified by the amendments recommended by the Committee on Oversight and Government Reform now printed in the bill, shall be considered as adopted in the House and in the Committee of the Whole. The bill, as amended, shall be considered as the original bill for the purpose of further amendment under the five-minute rule and shall be considered as read. Notwithstanding clause 11 of rule XVIII, no further amendment to the bill, as amended, shall be in order except those printed in the report of the Committee on Rules accompanying this resolution. Each further amendment may be offered only in the order printed in the report, may be offered only by a Member designated in the

report, shall be considered as read, shall be debatable for the time specified in the report equally divided and controlled by the proponent and an opponent, shall not be subject to amendment, and shall not be subject to a demand for division of the question in the House or in the Committee of the Whole. All points of order against such further amendments are waived except those arising under clause 9 or 10 of rule XXI. At the conclusion of consideration of the bill for amendment the Committee shall rise and report the bill, as amended, to the House with such further amendments as may have been adopted. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit with or without instructions.

Sec. 2. During consideration in the House of H.R. 985 pursuant to this resolution, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.